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No. 73

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

UNITED STATES OF AMERICA, *Appellant*

v.

MARYLAND AND VIRGINIA MILK PRODUCERS ASSOCIATION, INC., *Appellee*

On Appeal from the United States District Court for the District of Columbia

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MOTION TO DISMISS IN PART

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 942

UNITED STATES OF AMERICA, *Appellant*

v.

MARYLAND AND VIRGINIA MILK PRODUCERS ASSOCIATION, INC., *Appellee*.

On Appeal from the United States District Court for the District of Columbia

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MOTION TO DISMISS IN PART

Appellee, Maryland and Virginia Milk Producers Association, moves to dismiss that portion of the appeal taken by the United States which complains that the judgment entered by the district court on January 22, 1959, ordering the Association to divest itself of the assets of Embassy Dairy in good faith as a going dairy business, affords insufficient relief against the acquisition of those assets.

The Government's appeal raises two questions. The first concerns the scope of the exemption which the Capper-Volstead and Clayton Acts accord to agricultural cooperatives from the prohibitions of Section 2 of the Sherman Act. That question merits this Court's review as part and parcel of the intimately related questions of exemption presented by appellee in its own Jurisdictional Statement, No. 898, this Term. But the Government's second question, attacking exercise of the trial court's discretion in fashioning a judgment that requires the complete and bona fide divestiture of assets acquired in a single transaction,[1] presents no issue of importance which merits review by itself or warrants diverting this Court's attention from the substantial questions of agricultural cooperative antitrust exemption raised by both parties.

STATEMENT

On January 22, 1959 the district court conducted a hearing (Tr. 924-977) to resolve the differences between the judgments proposed by the parties. At the conclusion of that hearing the court entered a judgment (App. 35a-37a) decreeing that (1) the Association's acquisition of the Embassy assets violated Section 7 of the Clayton Act (¶1),[2] (2) the Association's acquisition of the stock of the so-called Richfield-Wakefield Dairy did not violate Section 7 (¶2), and (3)

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[1] The question of relief will of course become moot if the Court sustains the Association's claim in No. 898 that the transaction was exempt from antitrust prosecution by the Department of Justice.

[2] All paragraph references herein are to the judgment set forth in the appendix (App. 35a-37a) to the Association's Jurisdictional Statement in No. 898.

the contract by which the Association acquired the Embassy assets, together with its ancillary covenants, violated Section 3 of the Sherman Act (¶3). Pursuant to these findings the judgment invalidated these contracts (¶7) and ordered the Association to dispose of "as a unit and as a going dairy business all assets of Embassy Dairy, Inc., tangible and intangible, which it acquired on July 26, 1954, and replacements therefor" (¶4). The divestiture must be carried out "in good faith" and requires prior approval of the district court (¶5). The Association must report its efforts to effect the divestiture to the court within 60 days of the effective date of the judgment, every 90 days thereafter and "on such other dates as [the] Court may order" (¶5). Pending divestiture the Association must "administer the assets acquired from Embassy Dairy, Inc., and replacements therefor, in good faith as a going dairy business with a view to preserving the said assets in as good condition as possible, ordinary wear and tear excepted" (¶6). The court retained jurisdiction to enable either party to apply for further orders and interpretations of the judgment, and "for the enforcement of compliance therewith and punishment of violations thereof" (¶8).

The United States has not appealed from that part of the judgment which validated the acquisition of the Richfield-Wakefield Dairy. It has, however, sought review of the judgment in this Court on four grounds: (a) that the divestiture judgment should have been directed to all assets used in the Embassy operation "as of the date of divestment" (J.S. 3)[3] rather than to assets "acquired on July 26, 1954, and replacements

[3] All J.S. references herein are to the Jurisdictional Statement filed by the United States, No. 942.

therefor" (¶4); (b) that the requirement that the Association administer the Embassy assets and replacements "in good faith" and dispose of them "as a unit and as a going dairy business" should have been supplemented by an express prohibition against operation by the Association of any dairy (including Richfield-Wakefield) other than Embassy pending divestiture and for a "reasonable time" (ten years—R. 2554) thereafter; (c) that the divestiture judgment should have prohibited the Association from acquiring any new dairy for a period of twenty years (R. 2557) unless it shows to the satisfaction of the court that such acquisition would not substantially lessen competition; and (d) that the judgment should have supplemented the requirement that the Association make frequent reports to the court by granting visitation rights to the Government.

ARGUMENT

This motion urges the Court to confine its review of the judgment below to the important and complex issue—raised in separate appeals by both the United States and the Association—of defining the scope of agriculture cooperatives' exemption from the antitrust laws. The Association opposes the Government's effort to encumber those appeals with an intense factual review of the entire record underlying the divestiture judgment. We believe that the Government's questions as to relief misconceive the province of an equity decree. On one hand, they seek to have this Court spell out the intricate details of how the district court shall execute its own mandate for "a complete divestiture, a bona fide divestiture" (Tr. 924). On the other hand, they urge this Court as a matter of law automatically to enjoin future, post-

divestiture, acquisitions and other operations by the Association on the basis of a record devoid of evidence as to the need for or propriety of such relief. We believe that such contentions, which would constrain the broad discretion reposed in district courts to fashion antitrust judgments "to fit the exigencies of the particular case," *International Salt Co.* v. *United States*, 332 U.S. 392, 400-401, do not merit plenary consideration by this Court. The Government's failure to appeal from Judge Weinfeld's recent denial of similar relief in the Bethlehem-Youngstown merger case supports our view.

This is not a case, such as those cited by the Government where vast conspiracies or foreclosures of markets require the pervasive intervention of a district court to reform practices which have regimented an entire industry. The judgment challenged here was formulated after the district court had tried the legality of two acquisitions of retail outlets by a producer cooperative and had found one to be invalid. It thereupon undertook "to do everything to see that that single transaction is undone" (Tr. 937). In a hearing held after submission of proposed judgments by both parties, the court carefully and patiently considered all contentions and questions raised and indicated the intended application of its judgment to numerous fact situations posed by the Government. In formulating its "good faith" decree, the court assured the Government that it (Tr. 968-969):

> "always put a very broad construction on the words, 'good faith.' And any time the Government finds anything not done in good faith, you just make an appropriate application to the Court, and I will entertain it sympathetically."

That judgment on its face makes it clear that the court intends to divest the Association of all of the Embassy assets, as well as their replacements, and to restore Embassy to the market as a going dairy business independent of the Association.

A brief analysis of the four modifications of the judgment upon which review is sought here by the United States shows that two were rejected below because they exceeded the requirements of the case or involved factual details[4] which could better be handled by timely application to the court "at the foot of the decree." Two other errors now asserted by the United States were proposed in the draft judgment submitted below but abandoned at the hearing.

(a) Assets Required to be Divested

The United States urges that the district court erred by describing the assets to be divested as including only those assets acquired in 1954 from Embassy Dairy, Inc., and "replacements therefor." It seeks plenary consideration by this Court of the question whether all assets and equipment lawfully purchased or acquired by the Association since the Embassy acquisition, from Richfield-Wakefield or otherwise, should be divested if

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[4] The Court:

> "I always like equity decrees to be short and succinct and pointed, and not to go into too many details. It is humanly impossible to forecast every possible contingency that might arise; and if you anticipate certain contingencies, then you are liable to have the decree construed as though other contingencies are not covered. Whereas if you have a direct, unambiguous, broad clause, then it covers all possible contingencies. Now, if disputes arise, you come back here" (Tr 970-971).

presently used in the Embassy operation, whether or not they are "replacements" or are needed to maintain or sell Embassy as a going concern. The short answer to this contention is that it exceeds not only the relief merited[5] but the relief sought by the United States in the district court hearing.

While the Government's proposed judgment below (R. 2550-2559) did contain language similar to that urged in the Jurisdictional Statement, the objective sought to be achieved was much narrower than that urged here. The record clearly discloses that Government counsel was concerned not with the precise language of his proposed judgment but only that it "accomplish the result intended" (Tr. 946); he wanted assurance that the Richfield-Wakefield assets and other post-Embassy equipment would be covered by the final judgment if "inextricably intertwined" (Tr. 965) with the Embassy assets. This matter was not, as the Government contends (J.S. 14), postponed for future decision. The court gave such assurance, inserted appropriate language, and illustrated its application. Assets acquired from Richfield-Wakefield or elsewhere are required to be divested if so incorporated into the Embassy operation that the business cannot be sold as a going dairy concern without them (Tr. 945-948, 966-971).

(b) Operation of Another Dairy

The United States next urges that the judgment should have prohibited the Association from operating any dairy other than Embassy pending divestiture and

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[5] See opinion of Federal Trade Commission, *In The Matter of Crown Zellerbach Corp.*, 1958 CCH Trade Reg. Rep. ¶26, 923, p. 36, 462.

for a period of ten years thereafter (R. 2554). This represents, together with the contention in (a) above, an oblique effort by the Government to divest or prohibit the use of the Richfield-Wakefield assets without appealing from the district court's judgment that they were lawfully acquired.

The Government expresses concern that inadequate safeguards are provided against "predivestiture impairment of the value of Embassy as a going concern" (J.S. 15). This fear is explicitly laid to rest by the judgment itself. The Association is required prior to divestiture to administer the Embassy assets and replacements "in good faith as a going dairy business" (¶6) and to dispose of them "as a unit and as a going dairy business" (¶4), under continuing court supervision to insure good faith compliance (¶8).

The Government also urges here, as below, that the district court should have enjoined the Association from operating Richfield-Wakefield or any other dairy for ten years. Such a drastic prohibition is not, as the Government implies, a boilerplate provision inserted in every antitrust acquisition judgment. Limitations of this character obviously depend on the evidence presented to the court; yet at the hearing below the Government neither presented nor offered any evidence whatsoever to justify the injunction. In the absence of a strong showing of necessity, it would have been an abuse of discretion for the trial court to have included it. Cf. *United States* v. *National Lead Co.*, 332 U.S. 319, 353.

Moreover, the Government's effort to insulate Embassy from competition after divestiture ignores the facts, fully understood by the district court, of the highly competitive dairy business in Washington.

Many firms, representing 90 per cent of the distribution market, presently confront Embassy and will continue to confront Embassy, by whomsoever owned, with persistent efforts to capture its customers. In short, total divestiture of a going business, but not a sanctuary from competition in the thriving Washington marketplace, was assured.

(c) Injunction Against Future Acquisitions

The United States asserts that the district court "refused to consider, or hear argument on" an injunction against future acquisitions (J.S. 16). The fact of the matter is that after the district court invited argument, the Government abandoned this proposed injunction, rendering its omission unavailable as an appealable error.

At the outset of the hearing on relief, the district court stated that it had examined the proposals submitted by the parties and found that the draft proposed by the Government included certain "relief neither mentioned nor . . . contemplated by the opinion of this Court" (Tr. 924). Among such proposals was a 20 year injunction against future acquisitions (R. 2557). The court then stated: "Now if you would like to be heard upon that, Mr. Saunders, I would be very glad to hear you" (Tr. 924-925). While Government counsel thereafter argued freely and at length on numerous aspects of the proposed judgment, including meticulous attention to plurals (Tr. 962) and commas (Tr. 963), no mention whatsoever was made with respect to the modification now sought (Tr. 924-977).

Even if properly raised, however, the contention that the judgment should have enjoined future ac-

quisitions unless the Association sustains the burden of proving in advance that they would not substantially lessen competition is inappropriate here. The *Crescent* and *Schine* cases upon which the Government relies enjoined future acquisitions because the trial established unlawful acquisitions as the "pattern of past conduct." *United States* v. *Crescent Amusement Co.*, 323 U.S. 173, 186. There is no such pattern here. The Government challenged two acquisitions by the Association. One was found valid and one invalid. There is no warrant in the record, no proffer of evidence, no precedent in decisions of this Court for requiring a district court to impose a twenty-year antitrust strait jacket on a party who has been found to have made but a single unlawful purchase. See *United States* v. *Bethlehem Steel Corporation* (Civil Action No. 115-328, S.D. N.Y.) where similar relief was sought by the Government but denied in the unreported judgment of December 19, 1958.

(d) Visitation Rights

The refusal of the district court to grant broad visitatorial rights over the books, records, personnel and affairs of the Association will not, as the United States contends, impair its ability to determine compliance with the divestiture decree. In fashioning a decree to supervise the disposal of Embassy Dairy, the district court believed that compliance could adequately be assured by scrutiny of the reports which the Association is required to file every 90 days and "on such other dates as [the] Court may order" (¶5). The court stated that it did "not believe the Department of Justice should be given carte blanche to examine books and papers of the defendant at any time" (Tr. 940). But of paramount importance, and overlooked by the

Government in its Jurisdictional Statement, was the assurance given by the court to Government counsel that:

> "If there is any reason for examining books and papers you may make an application at the proper time to this Court at the foot of the decree" (Tr. 941).

Such a procedure for supervising the faithful execution of a judgment squarely accords with the rulings of this Court. *Associated Press* v. *United States*, 326 U.S. 1, 22-23; *Lorain Journal Co.* v. *United States*, 342 U.S. 143, 156-157. And district courts have not automatically inserted visitation provisions upon request of the Government. See the *Bethlehem Steel* case, *supra*.[6]

[6] Even in those cases where this Court has upheld the discretionary grant by a district court of visitation privileges, it has expressly condemned the provision sought by the Government in its proposed judgment below (R. 2558) requiring the Association not only to grant access to books, records, officers and employees, but to file reports upon demand with the Department of Justice as well. *United States* v. *Bausch & Lomb Optical Co.*, 321 U.S. 707, 728; *Hartford-Empire Co.* v. *United States*, 323 U.S. 386, 433.

CONCLUSION

For the foregoing reasons, appellee respectfully prays that so much of the appeal herein as is based upon alleged inadequacies of the relief granted by the judgment below be dismissed.

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